

BRIAN M. McINTYRE, Cochise County Attorney
BY: MICHAEL A. POWELL, Deputy County Attorney
Arizona State Bar No. 029158
P.O. Drawer CA
Bisbee, Arizona 85603
(520) 432-8700
ATTYME@COCHISE.AZ.GOV

FILED

2018 APR 19 AM 10:22

MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT

BY [Signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA

Plaintiff,

vs.

FAUSTO NAVARRO

Defendant.

) Case No. CR201800212

) JUDGE KELLIHER
) DIVISION II

) **RESPONSE TO MOTION FOR
) REMAND TO THE GRAND JURY
) FOR REDETERMINATION OF
) PROBABLE CAUSE**

The State of Arizona, through the Cochise County Attorney, Brian M. McIntyre, Cochise County Attorney, and Michael A. Powell, his Deputy, hereby responds to the Defendant's Motion for Remand to the Grand Jury for Redetermination of Probable Cause. This response is based upon the following Memorandum of Points and Authorities.

Memorandum of Points and Authorities

1) Factual Summary

The Defendant and his co-Defendant, Hernan Navarro, are brothers. The Defendant's birthday is November 11, 1993. His brother's birthday is December 15, 1995. The charges against the Defendant arise out of conduct occurring on December 30, 2014. At the time, the Defendant was 21 years old.

The Navarro brothers worked for their family's restaurant in Benson. At the time, Hernan was a senior in high school. The brothers knew the victims in this case, M.A. and S.D.

1 through school (where the girls were sophomores) and from times the girls had visited the
2 restaurant as customers. At the time, both victims were 16 years old.

3 Prior to December 30, the Navarro brothers had contact with the victims through online
4 messages and in-person discussion. The Defendant told S.D. that he "saw hearts" when he
5 looked at her and that she was beautiful. S.D. did not respond to this message. The Defendant
6 also wrote to S.D. inquiring if she had a boyfriend. S.D. replied that she did not. On December
7 30, S.D. and the Defendant discussed her coming to a party later that night at the Defendant's
8 home.

9 The brothers conspired to have the Defendant purchase alcohol in order to entice the
10 victims to their home. This conspiracy was captured in part in text messages exchanged
11 between the brothers. The Defendant also indicated that he wanted to go "rabbiting," which is
12 a slang term for picking up girls.

13 The Navarros invited S.D., M.A., and C.G. over to their home on December 30. They
14 indicated that alcohol would be served. The three girls met with Hernan at the restaurant in the
15 evening. He then took them to Walmart, where he purchased red Solo cups and ping pong
16 balls. After Walmart, Hernan took the girls to the Navarro residence.

17 Once at the Navarro home, the brothers supplied the girls with Bud Light, Watermelon
18 Smirnoff, and Jack Daniels. The girls reported that when they arrived, the alcohol was already
19 set up and ready to be drank. The girls and the Navarros played beer pong. During this time,
20 the girls consumed alcohol. The Defendant consumed little to no alcohol. In addition to the
21 girls and the Navarro brothers, the Defendant's cousin Giro was also present.

22 At some point during the evening, the Defendant indicated that he wished to go outside
23 and smoke a cigarette. He took S.D., C.G., and Giro outside. Hernan and M.A. remained in
24 the home. C.G. and Giro returned to the residence, leaving S.D. alone with the Defendant. The
25 Defendant began roughly kissing S.D. to the point that she believed her lip might be bleeding.
26 S.D. told the Defendant to stop, but he did not. The Defendant then put his hands forcefully
27
28



1 down S.D.'s pants. Again, she tried to get the Defendant to stop, but he did not. Eventually,
2 the Defendant forced S.D. into his truck, whereupon he got on top of her. He pulled S.D.'s
3 pants down and began engaging in sexual intercourse with her. S.D. did not consent to any of
4 this conduct. S.D. estimated that the sexual assault last for five minutes. The assault ended
5 when the other girls and Hernan came to the truck after Hernan committed his own sexual
6 assault upon M.A.

7 The matter was presented to the Grand Jury March 1, 2018. The matter was presented
8 as one case involving co-defendants. Evidence was presented that was common to both
9 brothers. The Grand Jury indicted both brothers as co-Defendants on a variety of sexual
10 offenses. Division V set the matter for a joint trial to begin on July 10, 2018.

11 12 **2) Law and Argument**

13 The duty of the grand jury is to decide whether probable cause exists and that probable
14 cause determination may only be challenged by a motion alleging the defendant was denied a
15 substantial procedural right or than an insufficient number of grand jurors concurred in the
16 indictment. Rule 12.9, Ariz.R.Crim.Proc., *State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38,
17 43 (1980). The term substantial procedural right is not defined by rule or case law in Arizona.
18 No authority exists requiring that the cases of co-defendants be presented independently.
19 Indeed, codefendant cases are presented before grand juries all the time throughout the state.

20 The Defense cites to *O'Meara v. Superior Court*, 173 Ariz. 355, 842 P.2d 1368
21 (Ariz.App. 1992). However, that ruling was expressly vacated in *O'Meara v. Gottsfeld*, 174
22 Ariz. 576, 851 P.2d 1375 (1993). Accordingly, the Court should disregard any citations in the
23 Defendant's motion to the Court of Appeals case.

24 In *Gottsfeld*, the Supreme Court stated that "due process only requires that the
25 prosecutor read all relevant statutes to the grand jury, provide them with copy of those statutes
26 to refer to during deliberations, and ask if they want any statutes reread or clarified." *Id.* at 578,
27
28

1 851 P.2d at 1377. The Court did not make any findings in that case regarding the presentation
2 of facts in a codefendant case. Moreover, the *Gottsfeld* court took a position in favor of
3 upholding an indictment where the basic procedural requirements were met.

4 A.R.S. § 21-413 establishes the duty of the grand jury: "the grand jury shall return an
5 indictment charging the person under investigation with the commission of a public offense, if,
6 from all the evidence taken together, it is convinced that there is probable cause to believe the
7 person under investigation is guilty of such public offense." Grand jury proceedings are not
8 intended to become mini trials. *See State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38, 43
9 (1980). The standards that are generally applicable to trial proceedings are not applicable to
10 grand jury proceedings. *See Id.* (permitting hearsay in grand jury proceedings); *State ex rel.*
11 *Woods v. Cohen*, 173 Ariz. 497, 502, 844 P.2d 1147, 1152 (1992) (finding that evidence
12 elicited in grand jury proceedings in violation of marital privilege did not warrant remand).
13 The protections afforded a defendant during grand jury proceedings are substantially *lower* than
14 during trial.

15 Rule 13.3 discusses the joinder of defendants within the same indictment; "two or more
16 defendants may be joined if each defendant is charged with each alleged offense, or if the
17 alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so
18 closely connected that it would be difficult to separate proof of one from proof of the others."
19 Joint trials are the rule, rather than the exception. *State v. Van Winkle*, 186 Ariz. 336, 339, 922
20 P.2d 301, 304 (1996), *citing State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). The
21 *Van Winkle* court discussed the concept of "rub-off" or "spill-over," in which a jury's
22 unfavorable impression of a defendant against whom evidence is properly admitted influences
23 the way jurors view the other defendant. In *Van Winkle*, the Court established that "rub-off
24 warrants severance only when the defendant seeking severance establishes a compelling danger
25 of prejudice against which the trial court cannot protect."

26 The Defendant's Motion for Remand combines Rule 12.9 with arguments based on
27
28

COCHISE COUNTY ATTORNEY'S OFFICE
POST OFFICE DRAWER CA
BISBEE, ARIZONA 85603
(520) 432-8700



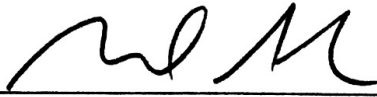
1 Rules 13.3 and 13.4. The Defense cites to *no* authority in support of its argument that
2 codefendant cases may not be presented together. In effect, the Defense argues that the cases
3 against the Navarros should be severed, but that is not the motion before this court. However,
4 even when considering whether severance is appropriate, the Defense motion must still fail.
5 The brothers conspired to invite the victims over, get them drunk, and eventually hook up with
6 them. The offenses are additionally so closely connected that it would be difficult to separate
7 proof of one from proof of the others.

8 Additionally, the Defense cannot show how separate presentations would make any
9 difference. Practically speaking, had the State presented the matters separately, the cases
10 would have been presented consecutively. Thus, the grand jurors would have heard the same
11 evidence twice, and any potential spill-over suggested by the Defense would still be present.

12 The Defendant was not denied a substantial procedural right. Therefore, the
13 Defendant's motion should be denied.
14
15
16
17
18
19

20 RESPECTFULLY SUBMITTED this 19th day of April, 2018.

21 COCHISE COUNTY ATTORNEY

22 By: 
23 MICHAEL A. POWELL
24 Deputy County Attorney
25
26
27
28

02/51/70 50:52:11

Copy of the foregoing
mailed/delivered/faxed
this 19th day of April, 2018,
to:

The Honorable John F. Kelliher
Judge of the Superior Court
Division II
Bisbee, Arizona 85603
Via Courthouse Distribution Box

David Wilkison, Esq.
PO Box 75
Vail, Arizona 85641
Attorney for the Defendant
Via Courthouse Distribution Box

COCHISE COUNTY ATTORNEY'S OFFICE
POST OFFICE DRAWER CA
BISBEE, ARIZONA 85603
(520) 432-8700



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28